DEEPAK JAIKISHAN JAIKISHAN REWACHAND v. DATO' SERI MOHD NAJIB TUN ABDUL RAZAK & ORS

HIGH COURT MALAYA, KUALA LUMPUR
QUAY CHEW SOON JC
[SUIT NO: WA-22NCvC-679-10-2018]
25 AUGUST 2020

CIVIL PROCEDURE: *Striking out – Statement of claim – Action relating to legal or equitable interest in assets of company – Action commenced in capacity as director and shareholder of company – Whether director or shareholder lacked locus standi – Whether statement of claim vague, imprecise and lacking in material particulars – Whether pleading embarrassing for lack of clarity – Whether statement of claim unsustainable – Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c) & (d)*

CONTRACT: *Void contract – Contrary to public policy – Agreement obtained by bribing public official – Whether involves corrupting and injuring public administration – Whether rights under contract liable for forfeiture – Whether contract void – Contracts Act 1950, s. 24(a), (b) & (e)*

TORT: *Conspiracy – Conspiracy to defraud – Whether losses suffered by director and shareholder of company caused by conspiracy to defraud, undue influence and conversion – Whether conspiracy must be particularised with clarity and precision – Whether general allegations sufficient*

The plaintiff's action, as a former director and shareholder of Astacanggih Sdn Bhd, was based on the torts of conspiracy, conspiracy to defraud, undue influence and conversion allegedly committed by the defendants resulting in losses suffered by the plaintiff in relation to an acquisition agreement. The parties to the acquisition agreement were Awan Megah Sdn Bhd and Astacanggih and concerned the acquisition of certain lands in Klang ('lands') by Astacanggih. The plaintiff, in the statement of claim ('SOC'), alleged that (i) the first defendant ('D1'), in his capacity as the then Minister of Defence, approved the acquisition of the lands by Astacanggih through the acquisition agreement. D1 requested RM30 million as 'consideration' to be paid in cash to his brother, Dato' Ahmad Johari bin Tun Abdul Razak ('JR'); (ii) following an alleged breach of the acquisition agreement by Awan Megah, Astacanggih commenced a suit ('Suit 253') alleging that Raja Ropiaah ('RR'), a director and substantial shareholder of Awan Megah and a close associate or proxy of D1 and the second defendant ('D2'), responsible for the breach. However due to pressure exerted by D1 and D2, Astacanggih withdrew Suit 253; (iii) the plaintiff was forced by D1 and D2 to sell 80% of the shares in Astacanggih to the fourth defendant ('D4') by way of a share sale agreement ('share sale'). D1 and D2 ordered the third defendant ('D3') to enter into the share sale through D4, a wholly owned subsidiary of D3.

A The plaintiff's attempt to buy back the shares in Astacanggih from D4 was unsuccessful; (iv) after the share sale, D1 and D2 ordered D3, through D4, to enter into a sale and purchase agreement for the purchase of the land and to cause Astacanggih to sell the land to UMW Holdings Bhd for a huge profit; and (v) the plaintiff, as the majority shareholder of Astacanggih, suffered loss
B by reason of the breach of the acquisition agreement, withdrawal of Suit 253, share sale, the land sale and the UMW sale. This was the application to strike out the plaintiff's writ of summons and SOC: (i) *vide* encl. 14 by D1 and D2 pursuant to O. 18 r. 19(1)(a), (b), (c) or (d) of the Rules of Court 2012 ('ROC') or under the inherent jurisdiction of the court; and (ii) *vide* encl. 9 by D3 and
C D4 pursuant to O. 18 r. 19(1)(a), (b) or (d) of the ROC or under the inherent jurisdiction of the court.

Held (allowing encls. 14 and 9 with costs):

(1) A shareholder has no legal or equitable interest in the assets of the company. The plaintiff brought the action in his capacity as a director
D and shareholder of Astacanggih. The rightful party to the claim, which was premised on the value of the land, would be Astacanggih. However, Astacanggih was not named as a plaintiff and neither had the plaintiff obtained leave pursuant to s. 347(1) of the Companies Act 2016 to claim on behalf of Astacanggih. As a shareholder of Astacanggih, the plaintiff
E had no interest in the acquisition agreement and could not claim for any loss with regard to the value of the land. Also, as a director of Astacanggih, the plaintiff had no interest in the land. Hence, the plaintiff lacked *locus standi* and the SOC was struck out for being obviously unsustainable. Further, the plaintiff not being a contracting party to the
F acquisition agreement lacked privity of contract. (paras 18 & 21-27)

(2) The SOC was vague, imprecise and lacking in material particulars. The SOC did not identify with any degree of particularity (i) a conspiratorial agreement between the defendants; (ii) a predominant intention to harm the plaintiff; (iii) the overt acts in support of the alleged conspiracy; and
G (d) loss and damage suffered by the plaintiff. There were no particulars of how the defendants conspired or combined between themselves with the common intention of causing harm to the plaintiff. At best, the SOC alleged that only D1 and D2 had a common objective of causing the plaintiff harm and enriching themselves. There was no allegation that
H D3 and D4 shared this objective. The statements in the SOC were mere general allegations. (paras 32, 33, 36 & 38)

(3) A pleading is embarrassing where it is not clear as to what is being pleaded. The SOC did not particularise (i) how and in what manner D1 and D2 dominated the plaintiff; (ii) the acts done by D1 and D2 in
I exerting undue influence on the plaintiff; and (iii) the unfair advantage obtained by D1 and D2. D1 and D2 were merely grouped together with

D3 and D4 without setting out each party's particulars of wrongdoing. There was no averment in the SOC that D3 and D4 exercised any undue influence over the plaintiff to enter into the share sale. Neither was there any averment that the land was purchased by D4 as a result of any undue influence exercised by D3 or D4 over the plaintiff. The SOC did not plead facts to show why D3 and D4 should be held responsible to the plaintiff for any alleged pressure applied on him by D1 and D2. (paras 42-45)

(4) The undue influence could not be sustained against D3 and D4 because a contract that is procured through undue influence is void *ab initio*; it is merely voidable at the election of the innocent party who entered into it as a result of the undue influence. The innocent party who has a right to void contract on the basis that it was procured through undue influence may instead elect to affirm it. In this case, the plaintiff had made a positive assertion that he attempted to buy back the Astacanggih shares that were sold to D4, which may be construed to mean that he had elected to affirm the share sale. (paras 46-48)

(5) The plaintiff's claim in the tort of conversion was obviously unsustainable as (i) the plaintiff had not pleaded that he had possession of the land or had a right to possess the land at the time that the land was allegedly converted by D3 and D4; and (ii) the plaintiff could not claim any rights of ownership in the land as a shareholder could not possibly claim any legal or equitable right to own a company's assets. The pleadings must show that D3 and D4 deprived the plaintiff of the right to own and possess the land. The SOC also did not disclose any acts of conversion by D1 and D2 and neither did it plead that D1 or D2 assisted in any acts of conversion. Vague assertions of 'influencing' D3 as the holding company of D4 were insufficient. (paras 55-59 & 63)

(6) The settlement reached in Suit 253 put an end to the dispute concerning the acquisition agreement. As such, a claim for loss arising from the acquisition agreement was unsustainable. The plaintiff was estopped from bringing the instant suit to enforce rights under the acquisition agreement which had been settled with finality. (para 67)

(7) The acquisition agreement would be void under s. 24(a) and (b) of the Contracts Act 1950 because it was obtained by the plaintiff bribing a public official, which is a punishable offence under s. 21(d) of the Malaysian Anti-Corruption Commission Act 2009 ('MACC Act') and ss. 162 and 163 of the Penal Code. By virtue of these offences, any rights under the acquisition agreement were liable to forfeiture under ss. 40 or 41 of the MACC Act. The acquisition agreement would also be void under s. 24(e) of the Contracts Act on the ground of public policy as it involved corrupting and injuring the public administration. (paras 72, 75 & 76)

(8) It was frivolous and vexatious for the plaintiff to seek relief concerning the acquisition agreement, the share sale and the land sale without naming the other parties thereto in the instant suit. It was not possible for the court to grant the plaintiff any relief in respect of those agreements unless all the relevant parties were before the court. The plaintiff also was not entitled to make allegations against third parties without naming them as parties. Hence, a cause of action could not be founded on the mere bald assertion that RR was a close associate or proxy of D1 and D2. If the plaintiff alleged wrongdoing against RR, then he should seek recourse against her. Whereas, JR was alleged to have been part of the conspiracy but was not named as a party in the suit. (paras 78, 80 & 81)

Case(s) referred to:

Abdul Jalal Ahmad & Ors v. Pegawai Pemegang Harta Cawangan Negeri Sembilan & Ors [2004] 7 CLJ 293 HC ***(refd)***

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 CA ***(refd)***

Aras Jalinan Sdn Bhd v. Tipco Asphalt Public Company Ltd & Ors [2011] 8 CLJ 830 CA ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal [2016] 3 CLJ 676 CA ***(refd)***

Director Of Forestry, Sabah & Anor v. Mau Kam Tong & Ors And Another Appeal [2010] 3 CLJ 377 CA ***(refd)***

Drummond-Jackson v. British Medical Association and Others [1970] 1 WLR 688 ***(refd)***

Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors [1996] 3 CLJ 695 HC ***(refd)***

Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor [2008] 1 CLJ 651 CA ***(refd)***

Kepong Prospecting Ltd & Ors v. Schmidt [1967] 1 LNS 67 PC ***(refd)***

Khairy Jamaluddin v. Dato' Seri Anwar Ibrahim [2013] 6 CLJ 849 CA ***(refd)***

Konsortium Lebuhraya Utara-Timur (KL) Sdn Bhd v. Liew Choong Kin [2018] 6 CLJ 217 CA ***(refd)***

Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA ***(refd)***

McKay and Another v. Essex Area Health Authority and Another [1982] 1 QB 1166 ***(refd)***

Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners) [2007] 4 CLJ 725 FC ***(refd)***

Metroplex Holdings Sdn Bhd v. Commerce International Merchant Bankers Bhd [2013] 8 CLJ 329 CA ***(refd)***

OSK Trustees Bhd & Anor v. Metroplex Holdings Sdn Bhd [2019] 10 CLJ 1 CA ***(refd)***

Philip Morris Products Inc v. Power Circle Sdn Bhd & Ors [1999] 1 SLR (R) 964 ***(refd)***

Pioneer Haven Sdn Bhd v. Ho Hup Construction Company Bhd & Anor And Other Appeals [2012] 5 CLJ 169 CA ***(refd)***

Prudential Assurance Co Ltd v. Newman Industries Ltd and Others (No 2) [1982] Ch 204 ***(refd)***

Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***
Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications [2010] 5 CLJ 32 CA ***(refd)***
See Thong & Anor v. Saw Beng Chong [2012] 1 LNS 817 CA ***(refd)***
Semesta Insurance Underwriting Agency Sdn Bhd v. Koperasi Insurance (M) Bhd & Another Suit [2011] 3 MLJ 379 ***(refd)***
Shahidan Shafie v. Atlan Holdings Bhd & Anor & Other Appeals [2005] 3 CLJ 793 CA ***(refd)***
Tan Ong Ban v. Teoh Kim Heng [2016] 3 CLJ 193 FC ***(refd)***
United Malayan Banking Corp Bhd v. Palm & Vegetable Oils (M) Sdn Bhd & Ors [1982] CLJ 547; [1982] CLJ (Rep) 358 FC ***(refd)***
Wong Yee Boon v. Gainvest Builders [2017] 10 CLJ 209 CA ***(refd)***

Legislation referred to:
Companies Act 2016, s. 347(1)
Contracts Act 1950, ss. 16, 20, 24(a), (b), (e)
Malaysian Anti-Corruption Commission Act 2009, ss. 21(d), 40, 41
Penal Code, ss. 162, 163
Rules of Court 2012, O. 18 rr. 12(1)(a), (1A), 19(1)(a), (b), (c), (d), (2)

Other source(s) referred to:
Winfield & Jolowicz on Tort, 19th edn, p 550

For the plaintiff - Mohamed Haniff Khatri Abdulla & Mohd Irzan Iswatt Mohd Noor; M/s Haniff Khatri
For the 1st & 2nd defendants - David Thomas Mathews & Chong Wei Teng; M/s Mathews Hun Lachimanan
For the 3rd & 4th defendants - Robert Lazar & Yatis Ramachandran; M/s Azman Davidson & Co

Reported by S Barathi

JUDGMENT

Quay Chew Soon JC:

Introduction

[1] The first defendant ("D1") and the second defendant ("D2") jointly filed an application *vide* encl. 14 ("encl. 14") to strike out the plaintiff's ("P") writ of summons and statement of claim ("SOC"). Enclosure 14 was made under O. 18 r. 19(1)(a), (b), (c) or (d) of the Rules of Court 2012 ("Rules of Court") or under the inherent jurisdiction of the court.

[2] Likewise the third defendant ("D3") and the fourth defendant ("D4") jointly filed an application *vide* encl. 9 ("encl. 9") to strike out P's writ and SOC. Enclosure 9 was made under O. 18 r. 19(1)(a), (b) or (d) of the Rules of Court or under the inherent jurisdiction of the court.

[3] D1, D2, D3 and D4 are collectively referred to as the "defendants". I allowed both encl. 14 and encl. 9. These are the grounds of my decision.

Background

[4] P sues in his capacity as a former director and shareholder of Astacanggih Sdn Bhd ("Astacanggih"). P's action is based on the torts of conspiracy, conspiracy to defraud, undue influence and conversion allegedly committed by the defendants which resulted in losses allegedly suffered by P in relation to an acquisition agreement dated 16 May 2007 ("acquisition agreement").

[5] The parties to the acquisition agreement are Awan Megah Sdn Bhd ("Awan Megah") and Astacanggih. The acquisition agreement concerns the acquisition of certain lands in Bukit Raja, Klang, Selangor ("land") by Astacanggih.

Plaintiff's Case

[6] From the SOC, P's claim is premised on his allegations that:

(i) D1, in his capacity as the then Minister of Defence, approved the acquisition of the land by Astacanggih through the acquisition agreement. For approving the acquisition agreement, D1 requested RM30 million as "consideration" to be paid in cash to his brother, Dato' Ahmad Johari bin Tun Abdul Razak ("JR"). P was at the material time the majority shareholder and a director of Astacanggih.

(ii) Raja Ropiaah bte Raja Abdullah ("RR") was at the material time a director and substantial shareholder of Awan Megah and was D1 and D2's close associate or proxy. Following an alleged breach of the acquisition agreement by Awan Megah ("AA breach"), Astacanggih commenced Kuala Lumpur High Court Civil Suit No. 21NCVC-253-12-2011 ("Suit 253") for breach of contract. RR is alleged to have been responsible for causing the AA breach. Astacanggih was allegedly compelled to withdraw Suit 253 ("Suit 253 withdrawal") as a result of pressure exerted by D1 and D2.

(iii) P was forced by D1 and D2 to sell 80% of the shares in Astacanggih to D4 by way of a share sale agreement dated 20 December 2012 ("share sale"). D1 and D2 ordered D3 to enter into the share sale through D4, which is a wholly-owned subsidiary of D3. P says that he later tried to buy back the shares in Astacanggih from D4 but was unsuccessful.

(iv) After the share sale, D1 and D2 ordered D3, through D4, to enter into a sale and purchase agreement dated 27 December 2012 for the purchase of the land ("land sale"). Thereafter D1 and D2 ordered D3, through D4, to cause Astacanggih to sell the land to UMW Holdings Bhd for a huge profit ("UMW sale").

(v) P, as the majority shareholder of Astacanggih, has suffered loss by reason of the AA breach, the Suit 253 withdrawal, the share sale, the land sale and the UMW sale.

[7] The background facts are as follows:

(i) There was a privatisation agreement dated 8 June 2005 ("privatisation agreement") entered into between Awan Megah, the Government of Malaysia ("Government") and Syarikat Tanah dan Harta Sdn Bhd ("STH"). The defendants are not parties to the privatisation agreement nor the acquisition agreement.

(ii) The land was the consideration offered to STH under the privatisation agreement for the development of a National Defence Education Centre. Under the privatisation agreement, it was agreed that the land will be transferred to Awan Megah.

(iii) Awan Megah then entered into the acquisition agreement with Astacanggih whereby the land would be transferred to Cebur Megah Development Sdn Bhd ("Cebur Megah"), a wholly-owned subsidiary of Astacanggih. The consideration for the purchase of the land was RM118 million. At the material time, only 19% of the shares in Astacanggih were registered in the name of P.

(iv) Astacanggih commenced Suit 253 in 2011 against the Government, STH, Awan Megah and Cebur Megah to seek specific performance of the privatisation agreement and the acquisition agreement for the transfer of ownership of the land to Cebur Megah. Save for Awan Megah, the other three defendants succeeded in striking out Suit 253 under O. 18 r. 19 of the Rules of Court ("O. 18 r. 19"). Subsequently, Astacanggih and Awan Megah entered into a settlement resulting in Suit 253 being withdrawn.

(v) D4 then acquired P's 19% shares in Astacanggih and a further 61% shares in Astacanggih from the other shareholders, making a total of 80% shares, for a total consideration of RM30 million.

(vi) Astacanggih and Awan Megah terminated the acquisition agreement *vide* a deed of mutual termination on 20 December 2012 ("deed of termination").

Relief Claimed By Plaintiff

[8] In the SOC, P claimed the following reliefs:

(i) General damages of RM600 million, exemplary damages of RM50 million and aggravated damages of RM26 million. I observe here that quantification of general damages is prohibited under O. 18 r. 12(1A) of the Rules of Court.

(ii) Special damages amounting to 80% of the market value of the land at the time of the share sale.

(iii) An order that D3 and D4 be directed to return the 80% shares in Astacanggih to P in return for RM30 million.

(iv) A declaration that the share sale, the land sale and the UMW sale are void as they are tainted by fraud, undue influence, conspiracy and the tort of conversion.

(v) A declaration that P's rights (through Astacanggih in respect of the acquisition agreement) in relation to the land be returned to P, through Astacanggih.

The Law

[9] The law pertaining to striking out of a party's pleading under O. 18 r. 19 is well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule. This summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable. It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence. (See the Supreme Court case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36).

[10] The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable. The court is not concerned at this stage with the respective merits of the claims. So long as the pleadings disclose some cause of action or raise some questions fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out.

[11] In *Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606 at p. 612, the Supreme Court held that an action can be summarily disposed if there is an absence of conflict of material evidence so that seemingly triable issues could be readily decided in such a way as to lead to the conclusion that the action was bound to fail.

[12] Whether it is plain and obvious that a suit should be struck out does not depend on the length of time it takes to argue an application to strike it out. Rather the question is whether, when the point has been argued, it becomes plain and obvious that there can be but one result. It can become plain and obvious that a claim cannot succeed after a relatively long and elaborate hearing. (See the English Court of Appeal cases of *McKay and Another v. Essex Area Health Authority and Another* [1982] 1 QB 1166 at pp. 1176 to 1177; and *Drummond-Jackson v. British Medical Association and Others* [1970] 1 WLR 688 at pp. 695 to 696).

[13] Thus in a suit involving complex questions of law but where the essential facts are not in dispute, the complexity of the questions of law should not be a reason for refusing relief under O. 18 r. 19. If the court is satisfied that the questions of law are unarguable, the court is not prevented from granting summary relief merely because "the question of law is at first blush of some complexity and therefore takes a little longer to understand". (See the Court of Appeal case of *Khairy Jamaluddin v. Dato' Seri Anwar Ibrahim* [2013] 6 CLJ 849; [2013] 4 MLJ 173 at p. 859 (CLJ); p. 182 (MLJ)).

Decision

[14] In my judgment, P lacks *locus standi* and hence the SOC is obviously unsustainable. In reaching my decision, I have avoided conducting a trial on affidavits. (See the Court of Appeal case of *Aras Jalinan Sdn Bhd v. Tipco Asphalt Public Company Ltd & Ors* [2011] 8 CLJ 830; [2012] 1 MLJ 510 at p. 515). I did not attempt to resolve conflict of evidence on the affidavits of the parties. (See the Court of Appeal case of *See Thong & Anor v. Saw Beng Chong* [2012] 1 LNS 817; [2013] 3 MLJ 235).

[15] I was mindful of O. 18 r. 19(2) which states that no evidence shall be admissible on an application under O. 18 r. 19(1)(a). Hence where I determined that the SOC discloses no reasonable cause of action, I only considered the pleadings as they stood. I considered affidavit evidence only with respect to the other limbs of O. 18 r. 19 namely O. 18 r. 19(1)(b), (c) and (d). (See the Court of Appeal case of *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651; [2008] 2 MLJ 11 at p. 35).

[16] P cited authorities to the effect that where the pleadings are defective or insufficient and the opposing party seeks to strike out the pleadings, the court must be wary and ought not to act summarily if an amendment can correct the defect. (See the Court of Appeal case of *Metroplex Holdings Sdn Bhd v. Commerce International Merchant Bankers Bhd* [2013] 8 CLJ 329; [2013] 4 MLJ 520 at p. 538). However, the lack of *locus standi* is not something that can be cured by an amendment to the SOC.

No Locus Standi

[17] The issue of whether a plaintiff has *locus standi* to sue ought to be decided by the court as a threshold issue first before going into the merits of the case. If a plaintiff is found to lack standing to sue, then the action fails *in limine* and there is no inquiry into the merits of the case. (See the Court of Appeal case of *Shahidan Shafie v. Atlan Holdings Bhd & Anor & Other Appeals* [2005] 3 CLJ 793 at p. 803).

[18] It is a settled principle of law that a shareholder has no legal or equitable interest in the assets of the company. A company is a separate legal entity distinct from its shareholders. The property owned by a company belongs to it and not to its shareholders. By this principle, P is not entitled to claim for losses which relate to Astacanggih's claims for its entitlement to the land under the acquisition agreement.

[19] This principle was stated in *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355 at p. 359 where the Court of Appeal said:

> The source of the confusion in the minds of the plaintiffs when pursuing their claim against the second to the sixth defendants is their oversight of the **fundamental principle that a company is a separate entity distinct from its shareholders.** The **property owned by a company belongs to it and not to its shareholders.** That proposition was established by the leading case of *Macaura v. Northern Assurance Co Ltd & Ors* [1925] AC 619 where Lord Buckmaster said:
>
> > Now, **no shareholder has any right to any item of property owned by the company,** for he has no legal or equitable interest therein. He is entitled to a share in the profits while the Company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.
> >
> > (emphasis added)

[20] In *Prudential Assurance Co Ltd v. Newman Industries Ltd and Others (No 2)* [1982] Ch 204, a shareholder brought an action in his personal capacity against the wrongdoers for loss suffered by the company. In dismissing the action, the English Court of Appeal said at p. 222:

> In our judgment the personal claim is misconceived ... But **what he cannot do is to recover damages merely because the company in which he is interested has suffered damage.** He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The **shareholder does not suffer any personal loss.** His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3 per cent shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing.
>
> (emphasis added)

[21] P brings this action in his capacity as a director and shareholder of Astacanggih. Astacanggih is not named as a plaintiff and neither has P obtained leave pursuant to s. 347(1) of the Companies Act 2016 ("Companies Act") to claim on behalf of Astacanggih. The claim is premised on the value of the land. In my view, the rightful party to claim for any such loss would be Astacanggih (as party to the acquisition agreement) and not P.

[22] P contends that by virtue of his position as the majority shareholder of Astacanggih at the material time, he has an equitable right to the land by virtue of the acquisition agreement and has suffered loss. I disagree. P, as a shareholder of Astacanggih, has no interest in the acquisition agreement and cannot claim for any loss with regard to the value of the land.

[23] Further, P (as a director of Astacanggih) also has no interest in the land. The following passage from the High Court case of *Semesta Insurance Underwriting Agency Sdn Bhd v. Koperasi Insurance (M) Bhd & Another Suit* [2011] 3 MLJ 379 at p. 407 makes this clear.

> A *company must be treated as a separate person to that of its participants.* Therefore the company's obligation and liabilities are entirely its own and not those of its participants. Thus, when a company incurs a contractual obligation or a liability in tort, that obligation or liability is that of the company and not of its members or officers.
>
> A company can sue and be sued in its own name. Being a separate legal entity, the company may enforce its rights by suing. It can definitely incur liabilities and be sued by other parties (see *Foss v. Harbottle* (1843) 2 Hare 461 where the court held that as a separate person in law, a company must enforce its rights by itself in its own name).
>
> A *company's property is not the property of its participants.* By virtue of the separate entity rule, a company may own property distinct from the property of its own members; and a company can enter into a contract with its controlling participants.
>
> The only conclusion one can arrived at based on the above situation is that *Christie cannot put forth a claim in his personal capacity as a corporate nominee, shareholder and director for damage allegedly suffered by Semesta. If Semesta has indeed suffered damage, then it is for Semesta in its own capacity as a separate legal entity to commence action for the damage not Christie.*
>
> (emphasis added)

[24] On this ground alone that P lacks *locus standi*, the SOC is struck out for being obviously unsustainable. Nevertheless for completeness, I will deal with the other arguments.

No Privity Of Contract

[25] It is evident from the pleadings that the rights to the land all stem from the acquisition agreement entered into between Awan Megah and Astacanggih. Those rights and the entitlements that flow therefrom are based purely on contractual terms.

[26] P is not a contracting party to the acquisition agreement. P therefore cannot seek to enforce rights in contract accruing to a contracting party for his own benefit. The doctrine of privity of contract precludes P from

claiming losses deriving from the acquisition agreement as he was not a party to the same. (See the Privy Council case of *Kepong Prospecting Ltd & Ors v. Schmidt* [1967] 1 LNS 67; [1968] 1 MLJ 170 at p. 174).

[27] By reason of the absence of privity of contract on the part of P, the SOC is obviously unsustainable.

Conspiracy

[28] Conspiracy is the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. There are two types of conspiracy. One is unlawful means conspiracy in which the participants combine to perform acts which are themselves unlawful (under either criminal or civil law). The other is lawful means conspiracy: a combination to perform acts which, although not themselves *per se* unlawful, are done with the sole or predominant purpose of injuring the claimant – it is in the fact of the conspiracy that the unlawfulness resides.

[29] The elements to a conspiracy claim are: (a) a combination or agreement between two or more individuals; (b) an intent to injure; (c) pursuant to which combination or agreement, and with that intention, certain acts were carried out; and (d) resulting loss and damage to the claimant. (See the Court of Appeal case of *Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal* [2016] 3 CLJ 676 at p. 683).

[30] If a claim is for unlawful conspiracy, the unlawful acts performed must be pleaded. In *Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors* [1996] 3 CLJ 695 at p. 705, the High Court said:

> However, apart from the **bare assertion of conspiracy** based on the joint filing of the action, no particulars of any kind were alleged against these six defendants to show how they were linked to the misdemeanours alleged against the fifth defendant. Just as fraud must be **pleaded with great particularity** so also all the constituent **ingredients going to make up the conspiracy must be pleaded.**
>
> (emphasis added)

[31] In *Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications* [2010] 5 CLJ 32; [2010] 5 MLJ 394 at p. 409, the Court of Appeal held that in a claim for conspiracy, the statement of claim must set out with clarity and precision the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy.

[32] In the instant case, the SOC is vague, imprecise and lacking in material particulars. The SOC does not identify with any degree of particularity: (a) a conspiratorial agreement between the defendants; (b) a predominant

intention to harm P; (c) the overt acts in support of the alleged conspiracy; and (d) loss and damage suffered by P. It is unclear whether the SOC is premised on lawful means conspiracy or unlawful means conspiracy.

Conspiracy – D1 And D2

[33] P claims that the various acts alleged in the SOC were caused by D1 and D2. However, the SOC is devoid of particulars as to the precise acts of D1 and D2, but only consist of vague assertions that the various alleged acts were on D1 and D2's instructions. There are no particulars of how the defendants conspired or combined between themselves with the common intention of causing harm to P (as opposed to Astacanggih, the company in which P was a director and shareholder).

Conspiracy – D3 And D4

[34] The SOC did not plead how D3 and D4 combined with D1 and D2 to pursue a common objective. On the contrary, the SOC alleges that D1 and D2 exercised undue influence on D3 and D4 and/or issued orders to them for the purpose of causing P harm. (See paras. 24, 31, 31.7, 32 and 32.4 of the SOC).

[35] The thrust of P's allegations against D3 and D4 is that they were allegedly compelled by D1 and D2 to purchase P's shares in Astacanggih and the land. If indeed D3 and D4 acted under the undue influence of D1 and D2 (as alleged by P), there could not possibly have been any agreement between all the defendants to combine with the aim of causing P harm. At best, the only inference that can be drawn is that D3 and D4 had no choice but to act under the orders of D1 and D2. Such an allegation cannot support a claim that D3 and D4 agreed to act in combination with D1 and D2 against P.

[36] Not only does the SOC fail to allege facts which can show that the defendants agreed to act in combination, it also fails to plead facts which can show that the defendants acted with the common objective of causing P harm. At best, the SOC alleges that only D1 and D2 had a common objective of causing P harm and enriching themselves. (See paras. 24 to 26 of the SOC). There is no allegation in the SOC that D3 and D4 shared this objective.

[37] There is no averment in the SOC that D3 and D4 carried out any act on their own volition in combination with D1 and D2 to cause P harm. All that the SOC alleges against D3 and D4 is that D4 purchased 80% shares in Astacanggih and the land. There is no averment in the SOC that these shares and land were purchased by D4 as part of a common plan between (a) D3 and D4; and (b) D1 and D2 to cause P harm.

[38] The statements in the SOC were mere general allegations. P had failed to plead the material particulars and had also failed to particularise with clarity and precision as to the purported conspiracy pleaded.

Undue Influence

[39] It is necessary for P to provide particulars in support of his claim of undue influence. Order 18 r. 12(1)(a) of the Rules of Court states:

> (1) Subject to paragraph (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words:
>
> (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies ...

[40] Undue influence exist where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. (See s. 16 of the Contracts Act 1950 ("Contracts Act")).

[41] P pleaded that D1 and D2 forced him to sell his shares in Astacanggih to D3 (through D4). (See para. 18 of the SOC). It is then alleged that D1 and D2 exercised undue influence over D3 and D4 by directing D3 (through D4) to purchase P's shares in Astacanggih and the land. (See paras. 31 and 32 of the SOC).

Undue Influence – D1 And D2

[42] The SOC did not particularise: (a) how and in what manner D1 and D2 dominated P; (b) the acts done by D1 and D2 in exerting undue influence on P; and (c) the unfair advantage obtained by D1 and D2. Merely saying things like "on the instructions of D1 and D2" and "due to the pressure, urge, fraud or undue influence exerted by D1 and D2" in the SOC is insufficient. Furthermore, D1 and D2 are merely grouped together with D3 and D4 without setting out each party's particulars of wrongdoing.

[43] It is trite that a pleading is embarrassing where it is not clear what is being pleaded. (See the High Court case of *Abdul Jalal Ahmad & Ors v. Pegawai Pemegang Harta Cawangan Negeri Sembilan & Ors* [2004] 7 CLJ 293 at p. 302). The following passage from the Singapore High Court case of *Philip Morris Products Inc v. Power Circle Sdn Bhd & Ors* [1999] 1 SLR (R) 964 at p. 965 is instructive:

> I had perused the statement of claim in advance. To explain how the statement of claim came across to me I must restate my view on the concept of cause of action. In *Multi-Pak Pte Ltd v. lntraco Ltd* [1992] 2 SLR (R) 382 I explained that the concept has two dimensions. First, it means the legal basis which entitles the plaintiff to succeed. Next, it signifies the factual situation which entitles one person to obtain from the court a remedy against another person.

> The importance of the second limb lies in its purpose: **there must be ample and clear allegations to inform the opponent and the court in advance of the case the opponent has to meet** and settle the defence and prepare for the trial. **Without that the defendants will be embarrassed. It may even amount to denial of justice to the defendants** as he might be able to assemble and preserve the necessary evidence to establish his defence. In other words, such incompetent and incomplete pleading might make a fair trial difficult or impossible.
>
> (emphasis added)

Undue Influence – D3 And D4

[44] There is no averment in the SOC that D3 and D4 exercised any undue influence over P to enter into the share sale. Neither is there any averment in the SOC that the land was purchased by D4 as a result of any undue influence exercised by D3 or D4 over P.

[45] P's allegation in the SOC that D1 and D2 forced him to sell his shares in Astacanggih to D4 cannot be a basis for undue influence against D3 and D4. The SOC did not plead facts to show why D3 and D4 should be held responsible to P for any alleged pressure applied on him by D1 and D2.

[46] There is another reason why undue influence cannot be sustained against D3 and D4. A contract that is procured through undue influence is not void *ab initio*; it is merely voidable at the election of the innocent party who entered into it as a result of the undue influence. Section 20 of the Contracts Act states:

> When consent to an agreement is caused by undue influence, the agreement is a contract **voidable at the option of the party whose consent was so caused.** Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the court may seem just.
>
> (emphasis added)

[47] Thus the innocent party who has a right to void a contract on the basis that it was procured through undue influence may instead elect to affirm it. He is bound by the contract if he elects to affirm it.

[48] In the instant suit, P has made a positive assertion in para. 27 of the SOC that he attempted to buy back the Astacanggih shares that were sold to D4. P's attempt to buy back these shares from D4 may be construed to mean that he has elected to affirm the share sale. If P did not accept that those shares had been validly sold to D4 pursuant to the share sale, he would have not made any attempt to buy back the Astacanggih shares.

A Undue Influence – D1 And D2's Alleged Influence Over D3 And D4

[49] In essence, the only material allegation of fact raised in the SOC against D3 and D4 is that D1 and D2 ordered D3 to purchase, through D4, P's shares in Astacanggih and the land.

B **[50]** P's allegation that D1 and D2 influenced D3 and D4 is unsustainable. D3 and D4 are corporate entities which operate through their respective board of directors. Decision making power and the authority to manage the affairs of a company lies with its board of directors. D3 and D4 are governed by their respective constitution (memorandum and articles of association) and the Companies Act. Moreover, D3 is a public listed company subject to
C the Listing Requirements of Bursa Malaysia.

[51] Due regard must be had to the statutory scheme of decision making by corporate entities. D1 and D2 are not directors of D3 and D4, vested with the power to manage the affairs of D3 and D4.

D *Conversion*

Conversion – D3 And D4

[52] In para. 32 of the SOC, P asserts that D3 and D4 are liable to him in the tort of conversion because they purchased the land from Awan Megah,
E thus depriving him of his alleged rights in equity to the land. P claims a right to own the land in equity on the basis that he was the majority shareholder in Astacanggih and therefore had a right in equity to Astacanggih's assets. P claims that Astacanggih has a right in equity to the land by virtue of fact that it entered into the acquisition agreement with Awan Megah.

F **[53]** At law, if a plaintiff does not have actual or an immediate right to possession of goods, he is not entitled to maintain a cause of action in conversion against another party who deals with those goods without his authority. Furthermore, ownership of goods without possession will not suffice to give a plaintiff a cause of action in the tort of conversion. (See the
G Court of Appeal case of *OSK Trustees Bhd & Anor v. Metroplex Holdings Sdn Bhd* [2019] 10 CLJ 1).

[54] In order to maintain a cause of action in the tort of conversion based on the allegations set out in the SOC, P must show that he had the right to own the land and had possession of the land at the time that the land was
H allegedly converted by D3 and D4. Alternatively, that he had actual possession or a right to immediate possession of the land. (See *Winfield & Jolowicz on Tort* (19th edn) p. 550; the Court of Appeal case of *Director Of Forestry, Sabah & Anor v. Mau Kam Tong & Ors And Another Appeal* [2010] 3 CLJ 377 at p. 437).

I

[55] In my opinion, P's claim is obviously unsustainable for the following reasons. Firstly, P has not pleaded that he had possession of the land or had a right to possess the land at the time that the land was allegedly converted by D3 and D4. Nowhere in the SOC does P assert that he either had possession or an immediate right to take possession of the land at the time D4 purchased the land.

[56] Secondly, P cannot claim any rights of ownership in the land. Therefore, even if a right to own the land without a right to immediately possess the land could suffice to maintain an action in the tort of conversion, P's claim fails because P cannot possibly claim any ownership rights in the land as a matter of law.

[57] The reason why P cannot possibly claim any ownership rights in the land is because a company is a separate entity from its shareholders. As discussed earlier, a shareholder cannot possibly claim any legal or equitable right to own a company's assets. (See the Court of Appeal case of *Pioneer Haven Sdn Bhd v. Ho Hup Construction Company Bhd & Anor And Other Appeals* [2012] 5 CLJ 169; [2012] 3 MLJ 616 at p. 643). Hence, even if it could be claimed that Astacanggih had an equitable interest in the land by virtue of the acquisition agreement, P cannot possibly claim any rights in the land even if he could claim to be the majority shareholder in Astacanggih.

[58] Further, Astacanggih could not possibly claim to have any equitable rights in the land unless it paid the full purchase price for the land to Awan Megah pursuant to the acquisition agreement. As a matter of law, Awan Megah would only become a bare trustee of the land for Astacanggih under the acquisition agreement once Astacanggih paid Awan Megah the full purchase price. (See the Federal Court case of *Tan Ong Ban v. Teoh Kim Heng* [2016] 3 CLJ 193; [2016] 3 MLJ 23 at p. 35). There is no assertion in the SOC that Astacanggih had paid the full purchase price for the land. In the absence of an averment in the SOC that Astacanggih made full payment of the purchase price for the land to Awan Megah pursuant to the acquisition agreement, Astacanggih cannot claim to own the land in equity under the acquisition agreement.

[59] Thirdly, the pleadings must show that D3 and D4 deprived P of the right to own and possess the land. The essence of the tort of conversion is that a plaintiff must show that the defendants have abused his right to possess the property in question.

[60] In para. 34 of their defence, D3 and D4 aver that the title to the land remains with Cebur Megah, a wholly-owned subsidiary of Astacanggih. P does not deny this in his reply to D3 and D4's defence. (See para. 17 of the reply). The fact that the land is currently registered in the name of Cebur

Megah is confirmed by copies of the title documents to the land exhibited as exh. "A-10" in the affidavit of Mohd Zaidi bin Zainol Rashid affirmed on 17 December 2018 in support of D3 and D4's application in encl. 9. The veracity of these title documents has not been denied by P.

[61] As the land is currently registered in the name of Cebur Megah, it is not possible for P to claim that Astacanggih has been deprived of the land. The fact of the matter is that Astacanggih, through its wholly-owned subsidiary Cebur Megah, currently owns and has possession of the land. Therefore, P's claim that Astacanggih has been wrongfully deprived of its rights to the land cannot be sustained.

[62] As the land is still owned by Astacanggih (through Cebur Megah), it appears that the UMW sale alleged by P did not take place or go through.

Conversion – D1 And D2

[63] The SOC does not disclose any acts of conversion by D1 or D2. Neither does it plead that D1 or D2 assisted in any acts of conversion. Vague assertions of "influencing" D3, as the holding company of D4, are insufficient.

Settlement

[64] The unsustainability of P's claim is further compounded by the fact that Astacanggih has abandoned all claims and interest in the acquisition agreement by executing the deed of termination.

[65] Suit 253 was filed by Astacanggih to enforce performance of the acquisition agreement. Astacanggih alleged that the defendants in Suit 253 were guilty of a conspiracy to injure, misrepresentation and breach of contract which purportedly resulted in the failure to transfer the land to Cebur Megah pursuant to the acquisition agreement.

[66] Suit 253 was struck out against three of the defendants on the ground that the claim did not disclose a reasonable cause of action. The claim against Awan Megah was withdrawn and a settlement was entered into between Awan Megah and Astacanggih *vide* the deed of termination.

[67] The settlement reached in Suit 253 puts an end to the dispute concerning the acquisition agreement. As such, a claim for loss arising from the acquisition agreement is unsustainable. P is estopped from bringing the instant suit to enforce rights under the acquisition agreement which have been settled with finality.

Plaintiff Not Majority Shareholder Of Astacanggih

[68] P purports to be the majority shareholder of Astacanggih. However this is not substantiated by the evidence. The share sale agreement states that P held 19% shares in Astacanggih. P signed that agreement, took the money

for his shares and cannot now take a contrary position. P should not be at liberty to approbate and reprobate having taken a particular position. (See the Court of Appeal case of *Konsortium Lebuhraya Utara-Timur (KL) Sdn Bhd v. Liew Choong Kin* [2018] 6 CLJ 217 at p. 233).

[69] P alleges that his interest in Astacanggih is derived from his 51% shareholding in Prestige Dimension Sdn Bhd ("Prestige Dimension"), another shareholder of Astacanggih at the material time. However, the company search on Prestige Dimension shows that P is only a director of Prestige Dimension and does not hold any shares.

[70] While P attempts to refute this evidence by alleging that the registered majority shareholder of Prestige Dimension is his nominee, this is not pleaded in the SOC. It is trite that the SOC cannot be improved by affidavit. The Federal Court in *United Malayan Banking Corp Bhd v. Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1982] CLJ 547; [1982] CLJ (Rep) 358; [1983] 1 MLJ 206 at p. 360 (CLJ); p. 207 (MLJ) said:

> This omission is surprising, to say the least, and we cannot but observe that **any defect or omission in the statement of claim cannot be made good by affidavit evidence …**
>
> (emphasis added)

[71] Even taking P's case at its highest (namely that he was the majority shareholder of Astacanggih), it still does not assist his case. As explained earlier, a shareholder has no interest in the property of the company.

Illegality

[72] P pleaded that Astacanggih entered into the acquisition agreement to acquire the land because P was willing to pay a bribe to D1 and D2. (See para. 10 of the SOC). If this allegation is true, the SOC must be struck out as it is obviously unsustainable because P claims a right to the land through the acquisition agreement, which he admits was procured through corruption.

[73] No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. (See the Federal Court case of *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212 at p. 223). Therefore if P's position is that unlawful gratification was paid to secure the land, P's case would be founded on an illegal or immoral act which the court should not assist. (See the Court of Appeal case of *Wong Yee Boon v Gainvest Builders* [2017] 10 CLJ 209 at 223- 224).

[74] In my opinion, the acquisition agreement would be void under ss. 24(a), (b) and (e) of the Contracts Act which read:

A The consideration or object of an agreement is lawful, unless:

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

...

B (e) the court regards it as immoral, or opposed to public policy.

[75] The acquisition agreement would be void under ss. 24(a) and (b) of the Contracts Act because it was obtained by P bribing a public official, which is a punishable offence under s. 21(d) of the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act") and ss. 162 and 163 of the Penal C Code. By virtue of these offences, any rights under the acquisition agreement are liable to forfeiture under ss. 40 or 41 of the MACC Act.

[76] The acquisition agreement would also be void under s. 24(e) of the Contracts Act on the ground of public policy. If permitted to stand, it would D allow P to benefit from his own crime of bribing a public official. Such an agreement involves corrupting and injuring the public administration, and is therefore against public policy.

Other Parties

E **[77]** There are other parties to the various agreements which are the subject of the relief claimed by P in the SOC, but who are not named as parties in the instant suit. Namely:

(i) in the case of the acquisition agreement and the land sale, Astacanggih and Awan Megah are parties in both transactions but are not named as F parties in the instant suit; and

(ii) in the case of the share sale, one Ikhwan Salim bin Dato' Haji Sujak and Prestige Dimension are parties to that transaction but are not named as parties in the instant suit.

[78] It is frivolous and vexatious for P to seek relief concerning the G acquisition agreement, the share sale and the land sale without naming the other parties thereto in the instant suit. It is not possible for the court to grant P any relief in respect of those agreements unless all the relevant parties are before the court. (See the Court of Appeal case of *Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551; [1995] 3 MLJ 417 H at pp. 423-424).

[79] It would not be appropriate for the court to make any findings or decisions that can affect the parties to those agreements who are not also named as parties in the instant suit. Especially in light of the allegations made by P concerning how those agreements came into existence and were dealt I

with by the parties thereto. (See the Federal Court case of *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners)* [2007] 4 CLJ 725; [2007] 5 MLJ 501 at p. 531).

[80] P also claimed that RR and JR were involved in the alleged conspiracy. With regard to RR, a cause of action cannot be founded on the mere bald assertion that she was a close associate or proxy of D1 and D2. If P alleges wrongdoing against RR, then it is her that he should seek recourse against, which P has not done in the instant suit.

[81] With regard to JR, he is alleged to have been part of the conspiracy but yet is not named as a party in the instant suit. P is not entitled to make allegations against third parties without naming them as parties. (See *Abdul Rahim* (*supra*) at p. 427).

Conclusion

[82] For the reasons above, I allowed both encl. 14 and encl. 9. I ordered P to pay two sets of costs. A sum of (i) RM15,000 to D1 and D2; and (ii) RM15,000 to D3 and D4.